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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 462.

THE BARR RUBBER PRODUCTS COMPANY,

Petitioner,

vs.

THE SUN RUBBER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONER.

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This reply brief is addressed virtually exclusively to a rebuttal of the "Respondent's Analysis of the 'Questions Presented' by Petitioner." It is this aspect of Sun's thoroughly specious defense of the appellate decision below which brings into sharpest focus the departures that necessitate review by this Court. Such necessity arises not only because of the fault of the Appellate Court below in prolonging the effects of the specious Molitor patent in suit (which respondent essentially acknowledges at the outset of its "Statement". [Resp. Br. pp. 1-2] to have burdened the Courts and the directly affected industries);

[1] In the same outset of its opposing brief Sun has emphasized that the Molitor patent "*was*" significant, i.e., it expired on February 24, 1970. Aside from support for the none too subtle plea that "Sun and its people" (A11, n. 10) by adverse possession are becoming thereby entitled to the fruits of the specious Molitor patent and the iniquities in securing and

(Continued on following page)

a far more insidious and cancerous effect, unless promptly and explicitly corrected, will remain, i.e., the special encouragement and gratuitous support this appellate decision gives to exploiters of other specious patents to resort to perjury and fraud in securing and maintaining them.

Question 1. Is a higher quantum of proof required for a finding of perjury and fraud in procuring and maintaining a patent than generally obtaining in civil cases? Sun would have this question sloughed off by the argument, in gist, that the entirety of Sections I and II of the appellate decision (A8-11) is mere irrelevant *obiter dicta* on an immaterial "*procedural* error" (Sun brief, p. 6, emphasis quoted). Sun thereby points up the magnitude of the Court of Appeals' mistake in law. The Court of Appeals grouped the District Court's finding of unenforceability of the Molitor patent because of fraud and perjury in its procurement and maintenance together with "obviousness" [35 U.S.C. 103] and "anticipation" [35 U.S.C. 102] in the District Court's "* * * determination that Sun's patent was invalid on three independent bases"

(Continued from preceding page)

maintaining it, the expiration of the patent near the end of the more than two years of pendency of the appeal below is a total irrelevancy. Certainly Sun's claim against Barr is not terminated, nor did such expiration put an end either to the multiplicity of suits in other courts of which the Court below took judicial notice and characterized as "untoward" (A10, n. 10) or to the additional suits in the United States and Canada (under the corresponding Canadian patent) listed in an addendum to the Appendix (A132). At least still another suit should be added to that addendum list, *Barberton Plastics Products, Inc. v. Sun Products Corporation and McNeil Corporation*, Northern District of Ohio, No. C-70-828, filed August 27, 1970. The *Barberton* case arose out of a claim of Sun for royalties under a Molitor patent license and an "invitation" by Sun that the license and royalty payments be continued under the Whittington patent (Trial Ex. 56) that Sun extracted from National Latex Products Co. as part of the price for suspension of the injunction enforced by Sun as a consequence of the *National Latex* litigation (274 F.2d 224).

(A8). Thus, by the remand to the District Court "of all issues pertaining to the patent's validity" (A9) and "Upon remand the proceedings below are to be conducted consistent with the approach taken herein relative to the issue of perjurious conduct on the part of Sun, its officers and employees" (A25), presumably reconsideration of the fraud and perjury of Sun's witnesses would not be wholly foreclosed in such a retrial, assuming Barr will have the stamina to re-face one. If so, the higher burden of proof on Barr in maintaining this defense would by no means be a mere *obiter dicta*.

More significantly, as a matter of permanent damage until eventually corrected by this Court, what other Federal Court, particularly District Courts and especially those in the very active Second Circuit, would presume to brush off the rulings of law and unwarranted criticism of the District Court in Section II of the decision (A9-11) as meaningless superfluities?

Question 2. Was it error for the Appellate Court to reverse the trial Court's finding of fraud and perjury and remand for trial of all issues of patentability without ruling on the patent's validity independently of such reversal of findings of fraud and perjury? Under this question Sun first repeats its contention that the standard of proof of fraud and perjury in patent litigation required by the appellate decision below was only *obiter dicta*. Sun would then brush this question aside as Barr's mere "attempts to imply" that the Court of Appeals erred.

Barr intends no mere implication of error. With the full trial record, all documentary exhibits, and all physical exhibits[1] before it, nothing stood in the way of the appel-

[1] Except Barr's large 1946 rotational casting machine for which photographs were stipulated to be a substitute.

late court to pass on the obviousness and anticipation of the Molitor patent in the light of law and evidence (A 40-62) on which those Sun's witnesses who were found to have combined to create a material and deliberate falsification in Sun's other representations to the Court, had nothing to say and could have said nothing.[3]

This was a plain dereliction, contrary to this Court's recommended practice (*Sinclair Co. v. Interchemical Corp.* [1945], 325 U.S. 327, 330) and required by the public interest in eliminating specious patents. *Lear v. Adkins* (1969) 395 U.S. 653, 674, n. 19.

In an effort to supply some support to the appellate Court's thesis and essay at remote later-day mind reading, namely, "that the District Court's findings of perjury *influenced* its determination of the question of obviousness and anticipation" (Resp. Br. p. 7, emphasis quoted), Sun asserts:

> "The District Court specifically utilized its evaluation of perjured and inconsistent testimony to apply the test of invention enumerated by this Court in *Graham v. Deere*, 381 U.S. 1 (1966) on the question of lack of invention (A54-5)." (Resp. Br. p. 7. Emphasis of citation to Appendix supplied.)

There is no support for this assertion at the cited pages of the appendix or elsewhere. The cited passage of the District Court's decision, long before it addressed itself to any issue of perjury and fraud, relates to the *scope of the claims* of the Molitor patent in suit, *not* the test of inventiveness as measured by anticipation or obviousness. The

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[3] As just one example, of these three perjurious witnesses, Molitor, his former laboratory chief, Cartlidge, and Smith, Sun's president, none participated in the testimony regarding the prior use at Goodrich's subsidiary, American Anode. And no testimony could undot an "i" or uncross a "t" in the corroborating publication (P. Ex. 33, p. 3) of this prior use, quoted for its clarity at A49.

District Court quoted from Sun's brief in the Sixth Circuit in *National Latex* to show that *there* Sun's contention as to the scope of the patent claims *was* consistent with the terms of the patent, as it was not in the trial Court below. The passage in *Graham v. Deere*, compared in this connection by the District Court, i.e., 383 U.S. at 25, relates to this Court's reiteration of disapproval of any "after thought" arising during litigation whereby an attempt is made to read into a patent a feature not found in it—precisely the tactic of Sun in the suit below in attempting to switch the coverage of the Molitor patent from a dual-temperature to a single-temperature process. This tactic, swallowed whole-hog by the Court of Appeals (A2-3), was recognized and rejected by the alert District Judge in the passage (A54-5) now mis-cited by Sun.

Question 3. Does a District Court have only limited investigational powers to determine if a judgment was obtained by fraud? If so, what are the limits which the District Court transgressed? In the face of the pronouncement of this Court in *Universal Oil Co. v. Root Ref. Co.* (1946), 328 U.S. 575, 580, Sun can only defend the appellate Court's criticism of the District Court's check of the printed record and briefs filed by Sun in the Sixth Circuit in *National Latex* (to ascertain whether Sun's assertion before the District Court below of the one-step scope of the Molitor claims and the Molitor-Smith story of a midnight phone call had been presented in the Sixth Circuit) by falling back on the avoidance:

> "The Court of Appeals in fact bottomed its reversal, not on whether the Court could *sua sponte* judicially notice the records and briefs in the Ohio case, but upon the fact that respondent had no fair notice thereof and no opportunity to meet the same. (A21)" (Resp. Br. p. 9.)

The pretext of Sun, accepted by the Court of Appeals (A22), that at no stage before or during the trial below, from its commencement to its conclusion ten weeks later, was Sun made aware that an issue of perjury and fraud existed is, of course, belied by Sun's counsel's comments of record at the outset of the trial—see the petition, p. 26.

Rule 52(a), F.R.C.P.

In further attempting, under this "Question 3" to justify (Resp. Br. pp. 9-11) the "reality" of the Court of Appeals' decision by its reference to selected portions of the "*trial transcript* of the Ohio case" (Resp. Br. p. 10, emphasis quoted) which the District Court refused to receive in Sun's application for rehearing, other affidavits submitted at that late date,[1] and still other documents *first submitted at the appeal hearing*, Sun finally, if unintentionally, comes to grips with a crux of the issues of Questions 1 and 2. This is the matter of the Court of Appeals' defiance of Rule 52(a), F.R.C.P., and this Court's decisions applying it, which Sun otherwise postpones to its "Argument" (Resp. Br. p. 17).

Sun cites *United States v. Gypsum Co.* (1948) 333 U.S. 364, 395:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court

[1] At that November 21, 1967 date, over ten months after the trial was concluded, Barr necessarily objected strenuously to any probative weight being given to any testimony, whether by new affidavits or in another trial of some ten years earlier (to which Barr was not a party directly or indirectly) and as to which Barr had had no opportunity of cross-examination. The District Court makes it clear in its decision on Sun's application that, wholly apart from the lack of timeliness of such "evidence" (A34-35), no such testimony could blot out Smith's clear confession, on cross-examination, of the phony marginal notes on the critical "progress reports" on which the Sixth Circuit had relied and which had been presented in the trial below as bona fide documents (A36).

> on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

Sun then argues that "By carefully reviewing the testimony and the principal documentary evidence on which the trial court relied * * *", "Thus, the Court of Appeals has fully complied with the mandate of this Court in *Gypsum* by making a thorough and thoughtful review of the record in this case." (Resp. Br. p. 17.)

Barr respectfully suggests that Sun's mere repetition of an assertion of the thoughtfulness and thoroughness of the Court of Appeals' labors does not give Sun any greater privity to what such labors actually were. Rather, the discrepancies between the actual record and published decisions of the District Court and the Court of Appeals' findings and unwarranted criticisms of the District Court demonstrate substantially less than compliance with the mandate of *Gypsum*. Indeed, the Court of Appeals' principal differing conclusion from the District Court's, i.e., regarding the meaning and effect of a document that the Court of Appeals does quote at length and discuss, namely, Sun's late attorney's letter of November 30, 1956 (P. Ex. 256x), boils down to a conclusion that: "In all likelihood" (A16) this deceased attorney had in mind a date earlier than that which was explicit on the face of the letter and which the District Court took at face value. Thus, the Court of Appeals did not comply with the further and slightly later mandate of this Court in *United States v. Yellow Cab Co.* (1949) 338 U.S. 338, 342:

> "[A] choice between two permissible views of the weight of [the] evidence is not 'clearly erroneous.'"

But it is in the reliance of the Court of Appeals (for the "reality" urged by Sun) upon affidavits and Ohio trial testimony rejected as far too untimely by the District

Court when presented with Sun's application for rehearing of the trial decision *and* the admission of and reliance on excerpts of the Ohio trial testimony *first presented at the argument of the appeal* and admitted "in the interest of justice" (A16, n. 14; A24) that the Court of Appeals unmistakably defies the admonitions of this Court. In sum, on evidence that was not before the trial Court at all and other evidence which the trial court rejected because under no circumstances could it re-write the record of confessions of Sun's president under cross-examination of the alterations of the documents purported to corroborate the oral testimonies, the Court of Appeals endeavored to decide *de novo* the issue of perjury and fraud perpetrated by Sun. This was in flat disregard of *Zenith Radio Corp. v. Hazeltine Research* (1969) 395 U.S. 100, 123:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts *must constantly bear in mind* that their function is *not* to decide factual issues *de novo*. The authority of an appellate court when reviewing the findings of a judge, as well as those of a jury, is circumscribed by the deference *it must give* to decisions of the trier of facts, who is usually in a superior position to weigh the evidence." (Emphasis supplied.)

Question 4. What is the power of the Commissioner of Patents under 35 U.S.C. 184, 185 to issue, ex parte, retroactive licenses for foreign filings after the U.S. Patent has issued? Sun would slough off this question by contending that though the question was raised on appeal, it was not "pressed." This is true only to the extent that other issues, such as the fraud and perjury of Sun's witnesses and the invalidity of the patent in suit for obvious-

ness and anticipation, were more strongly emphasized; it was certainly pressed to the point that the Court of Appeals found it necessary to endeavor to dispose of it, though only by a footnote (A7-8, n. 9):

> Sun's contention that there is no "judicial" dispute on this question would be correct if it were also limited to the time of raising the defense. See *Thermovac Industries Corp. v. Virtis Co.* (S.D.N.Y. 1968) 285 F. Supp. 113, and the basic conflict with this Court's decision in the landmark case of *Miller v. Brass Co.* (1881) 104 U.S. 350, both cited in the petition (pp. 32-33).

Question 5. What restraints of licensors and licensees from competing with each other are sanctioned under General Talking Pictures v. Western Electric? Sun would also slough off this question on the ground that it was not pressed on appeal. Sun overlooked the various grounds for which Barr urged that Goodrich should have been joined as a co-conspirator with Sun, as well as the variety of anti-trust law charges which the Court of Appeals brushed off in Section VII of its decision. Sun contends that the District Court found that "there was no elimination of competition," citing A79, par. C; this is a mis-citation. The facts recited in Barr's petition have never been denied, but only dismissed as insufficient under *General Talking Pictures* (1938) 304 U.S. 175; 305 U.S. 124. The finding that Barr failed to establish its damages is premised on the assumption that, because Barr was effectively blocked from substantial competition in the manufacture of hobby horses by the Sun-Wonder-Goodrich combination, it had no lost sales and thus no damages. If this theory were correct, then only incomplete monopolies could be in violation of the anti-trust law.